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No. 96-1497

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

THE CITY OF MORENO VALLEY; FRANK GARCIA; QUENTIN K. STROM; ANDREW RODRIGUEZ; RON SMITH,

Petitioners,

vs.

DESERT OUTDOOR ADVERTISING, INC. and OUTDOOR MEDIA GROUP, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

DENNIS J. MAHONEY
Counsel of Record
LEWIS, D'AMATO, BRISBOIS
& BISGAARD LLP
Attorneys for Petitioners
650 East Hospitality Lane
Suite 600
San Bernardino, California 92408-3508
(909) 387-1130

70787 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

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I
THE BILLBOARD OPERATORS ACKNOWLEDGE THAT THERE ARE ISSUES PRESENTED FOR REVIEW ON *CERTIORARI*

A. The billboard operators agree that this Court should decide whether a City must prove the efficacy of its billboard regulations.

The respondents do not contend that the Petition for a Writ of Certiorari does not present issues for review; they merely suggest that the questions should be rephrased so that, rather than being stated in a neutral fashion, the questions imply answers favorable to the respondents' position. The respondents even propose that this case presents additional issues for review by this Court.

Of particular interest is the respondent's Issue for Review number III(b): whether a sign ordinance violates the First Amendment with respect to commercial speech where no evidence is produced to show that the ordinance's sign restrictions further a substantial government interest. It is clear that the respondents believe that the Ninth Circuit, in the instant case, has (and ought to have) answered that question in the affirmative.

On this issue, the Ninth Circuit is not only in conflict with this Court, and with several other Courts of Appeals, but even with itself. In March 1997, the Ninth Circuit decided *Ackerley Communications of the Northwest, Inc., v. Krochalis*, 108 F.3d 1095 (9th Cir. 1997). In that case, the appellate court held that, "as a matter of law [a city's] ordinance, enacted to further the city's interest in esthetics and safety, is a constitutional restriction on commercial speech without detailed proof that the billboard regulation will in fact advance the city's interests." *Id.* at 1099-1100.

Like the billboard operators in the instant case, the billboard operator in the *Ackerley* case contended that a municipality must make a "factual showing that the ordinance advances its goals to a material degree." *Id.* at 1097. The district court held, on the basis of this Court's opinion in *Metromedia v. City of San Diego*, 453 U.S. 490 (1981), no such proof was necessary. *Ackerley*, *loc cit.* The Court of Appeals agreed. *Id.* at 1099.

It is virtually impossible to square the *Ackerley* decision with that in the instant case. In the *Ackerley* opinion, the Ninth Circuit stated that what it had done in the instant case was to overturn "summary judgment in favor of city that made no effort to show that it enacted its billboard ordinance to further any interest in esthetics or safety." *Id.* But that line hardly gives an accurate depiction of what happened in the instant case.

For one thing, the Court of Appeals in the case at bar actually quoted, in its opinion, language from the City's ordinance showing that the purpose of the ordinance was to regulate billboards in the interest of esthetics and safety. Petition, Appendix A, page A-9.

More importantly, however, after *Metromedia*, billboard regulation is *sui generis*. *Metromedia* recognized, as a matter of law, that billboards constitute esthetic blights and safety hazards, and, on the basis of *Metromedia*, municipal regulation of billboards—as such— has been recognized as constitutionally permissible. This has been recognized in other circuits; and, in *Ackerley*, has now been recognized in the Ninth Circuit as well. *See Outdoor Graphics, Inc., v. City of Burlington*, 103 F.3d 690, 695 (8th Cir. 1996) ; *see Georgia Outdoor Advertising v. City of Waynesville*, 833 F.2d 43, 46 (4th Cir. 1987).

B. The billboard operators agree that this Court should decide the proper scope of severability.

The billboard operators have agreed with the City that the issue of severability should be reviewed. In its statement of the issue in its Petition, the City asked the Court to review whether effect should be given to a severability clause when certain regulations (permits, zoning) were held unconstitutional, but other regulations (height, size, spacing, landscaping) were not held unconstitutional. The billboard operators, as their issue V, state the matter somewhat differently; but, at bottom, the issue is identical despite the difference in words.

The billboard operators, of course, misstate (because they overstate) the holding of the Court of Appeals. The Court of Appeals did not find that "*the* regulations relating to commercial . . . [and] noncommercial signs" violated the First Amendment, but that *some* of the regulations relating to signs violated the First Amendment. Specifically, the Court of Appeals found that the zoning and permit regulations violated the First Amendment, and, on that basis, it declared an entire ordinance invalid, including height restrictions, size limitations, spacing mandates, and landscaping requirements, among other things.

C. The billboard operators agree that this Court should decide whether exemptions of specific categories of signage render a billboard ordinance unconstitutional.

The billboard operators have agreed with the City that the scope of permissible exemptions from billboard regulations of general applicability needs to be decided by this Court. The exemptions that the Ninth Circuit found objectionable are those at section 19.2(d) of City of Moreno Valley Ordinance number 133. Petition, Appendix B, page B-2.

The City, in its statement of the issues presented, refers to the exemptions as "such postings as official notices and directional and informational signs." Petition, page I, at issue II. The billboard operators refer to the exemptions as "certain kinds of noncommercial messages" exempted "on the basis of content." Respondents' Brief, page ii, at issue IV(b). The Court may easily determine which, if either, of these characterizations is the more accurate. What is important is that both the City and the billboard operators agree that this is an issue presented for review.

D. The billboard operators agree that this Court should decide whether issuance of a conditional use permit may be conditioned on esthetic and safety standards.

The billboard operators assert that this case presents the issue whether "billboard operators must obtain a conditional use permit for their signs under a local sign ordinance." Respondents' Brief, page i, issue II. This is essentially the same issue that the petitioners put before the Court. Petition, page i, issue III.

The particular manner in which the City of Moreno Valley regulates billboards is to require that the operator obtain, prior to the erection of the billboard structure, a conditional use permit under the City's zoning code. City Ordinance number 133, Section 19.3, provides that the permit may issue if there is a finding that the structure is not harmful to health, safety, welfare, and esthetics, in accordance with detailed standards set forth at length following the introductory or prefatory statement. Petition, Appendix B, pages B-3—B-11.

The issue is whether the standards confer "unfettered discretion" that could be used to discriminate on the basis of the content of speech.

II
THE BILLBOARD OPERATORS MISSTATE THE PROCEDURAL HISTORY OF THE CASE

Although it probably makes little difference to the review of this matter on a writ of certiorari, the procedural history should be set straight. The Superior Court action against Outdoor Media Group, Inc., was not a "response" to the filing of this federal suit; it was an independent nuisance abatement action made necessary by the billboard operator's erecting a billboard *on a weekend*, beside the main freeway route through the City, without a conditional use permit or a building permit, and then lying about it.

On or about March 24, 1989, the City moved to dismiss this federal suit, based on *Younger v. Harris*, 401 U.S. 33 (1971). The district court granted the motion and dismissed the case. Then, on or about July 14, 1989, in response to an ex parte application by the billboard operators (represented by the same law firm that represents Desert Outdoor Advertising, Inc., in this Court), and without prior notice to the City or an opportunity for the City to be heard, the district court vacated its order dismissing the case, retained jurisdiction over the federal claims, abstained based on *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and stayed the federal proceeding.

The billboard operators were not "forced" to obtain any injunction about anything. However, based upon a "two-bites-of-every-apple" litigation technique, the billboard operators sought to defend the State court abatement actions by invoking certain provisions of the federal Constitution and the corresponding provisions of the California Constitution. Only by moving for summary adjudication of those defenses was the City able to make the billboard operators elect a forum to litigate those issues.

III
WHAT THE BILLBOARD OPERATORS HAVE CHARACTERIZED AS "MISSTATEMENTS" ARE, AT MOST, DIFFERENCES OF INTERPRETATION

Apparently influenced by the admonition in Rule 15.2, the billboard operators have spent eight pages of their Respondents' Brief listing what they are pleased to call "misstatements" and "misrepresentations" in the Petition. Most of these are simply matters about which the parties have disagreed and continue to disagree. Whatever do not fall into that class are misrepresentations—some of them serious—by the billboard operators themselves.

The regulation of billboards in City of Moreno Valley Ordinance number 133 is content neutral because it is applied prior to the existence of any content whatsoever. The regulation to which the billboard operators primarily object is a zoning restriction; no billboards ("outdoor advertising structures") may be constructed except in three zones. (The billboards at issue in this case were erected in other zones, without permits, in defiance of the zoning regulations.) Because the zoning applies to the *structure*, and prohibits *all* structures, it is inherently and ineluctably content neutral.

It is, therefore, not a "false assertion," but a most apt analogy, to compare the permit requirement for a billboard *structure* to that required for a theatre *structure* or a church *structure*. When a billboard operator seeks a permit to erect a structure, on which he will rent out space to advertisers, all that anyone knows—including the billboard operator itself—is that advertising copy will eventually be displayed; no one knows what the copy will say, and, indeed, it is expected by everyone that the copy will change over time. Similarly, when a theatre operator seeks a permit to erect a structure in which

he will produce plays or exhibit films, all that anyone knows—including the theatre operator—is that plays or movies will be shown; no one knows what those shows will be, and, indeed, it is expected by everyone that the shows will change over time.

It is a false statement on the part of the billboard operators that "a prospective builder of a sign would have to consider whether [it] intended the proposed sign to carry a political or other message that would make the sign a Display, and decide accordingly whether to apply for a permit." In fact, all that a prospective builder would have to know is whether it is erecting a sign on the premises of its business, or whether it is going into the business of renting space to off-premises advertisers. The billboard industry is a recognized business; it is defined and regulated in California under the Outdoor Advertising Act. California BUSINESS AND PROFESSIONS CODE, §§5200 *et seq*. It is preposterous of the respondents (Desert *Outdoor Advertising*, Inc., and *Outdoor Media* Group, Inc.) to suggest that a permit applicant would not know whether it was in the outdoor advertising business.

The Ninth Circuit's interpretation of the standards for issuing permits for outdoor advertising structures is truly eccentric. Ordinance number 133 is the part of the City's zoning code that regulates advertising. Section 19.3 of Ordinance number 133 is the section that regulates billboards. Section 19.3 begins with a preface, setting forth the purpose of the regulations that follow, including a clear statement that billboards are to be regulated in the interest of public health, safety, and esthetics. The preface is followed by a detailed statement of standards and procedures.

The Court of Appeals eccentrically found that the ordinance vested unbridled discretion in the City's planning officer. According to the Ninth Circuit, the officer is given no standards by which to decide on a permit application. But the language relied on for this

bizarre finding, which is the language quoted by the billboard operators at page 7 of their Respondents' Brief, is the preface to the longest part of Ordinance number 133, and is immediately followed by two substantive sections entitled "Locational Standards" and "Structural Standards." Petition, Appendix B, pages B-4—B-5.

The most eccentric factor of all is that it is that preface to Section 19.3 (the section of Ordinance number 133) that actually regulates billboards, and it contains a clear statement that billboards are being regulated in the interest of health, safety, and esthetics. That statement of purpose is immediately followed by the esthetic and safety standards to be applied. Only a jurist predisposed to outlaw all regulation of billboards and to vitiate this Court's holding in *Metromedia, Inc., v. City of San Diego*, 453 U.S. 490 (1981), could have interpreted the ordinance as the Ninth Circuit did.

It is completely and utterly inaccurate to compare City of Moreno Valley Ordinance number 133, section 19.3, to the ordinance that was at issue in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). The complete text of the ordinance that was at issue in that pre-*Metromedia* case is set forth in this Court's opinion at pages 149-150. A comparison of that ordinance with pages B-3—B-11 of Appendix B to the Petition will demonstrate, in short order, how fatuous is the billboard operators' contention.

The billboard operators' argument in the first full paragraph on page 8 of their Respondents' Brief is incomprehensible. The Ninth Circuit declared that the exemption of four categories of signs and notices from the general regulatory scheme renders the whole scheme constitutionally infirm under the First Amendment. Petition, Appendix A, page A-13. Two of those categories are official notices and directional signs. If one takes the Ninth Circuit opinion literally (and how else might one take it?), the exemption of official notices (such as weed abatement notices) and directional signs (such as those

directing traffic) tends to convert the entire regulatory scheme into a violation of the First Amendment. To the extent that any sense can be made of the first paragraph on page 8 of the Respondents' Brief, it appears to be an attempt to mislead this Court.

In their brief in this Court, the billboard operators go further. They contend that so long as a city allows "for sale" signs to be posted on properties throughout the city, any limitation on other signs or billboards is an unconstitutional content-based regulation. Respondents' Brief, page 14. Presumably, after "for sale" signs are banned, real estate agents will have to rent billboard space to list the addresses of homes and business properties for sale throughout the city. The City need do no more than to cite the billboard operators' own brief to convey the lunacy of their position.

The billboard operators purport to find "confusing" the concept that different regulation is not the same as more restrictive regulation. Ordinance number 133 regulates billboards more restrictively than on-site signs, in that it makes billboards a permissible use in fewer zones than on-site signs. Ordinance number 133 restricts billboards less restrictively than on-site signs in that it allows them to be higher off the ground and much larger than on-site signs. The billboard operators state, accurately enough, that their suit challenged only the zoning restrictions. The City contended, throughout the proceedings that the more restrictive zoning was balanced by less restrictive size and height allowances. However, the Ninth Circuit went far beyond anything contained in the pleadings or the final pretrial order, and—despite the wishes of all litigants—the entire ordinance is at issue for purposes of this Petition, and not just those parts challenged by the billboard operators in their pleadings.

IV
THE BILLBOARD OPERATORS SEEK TO MISLEAD THIS COURT CONCERNING HOW THE ORDINANCE WORKS

The billboard operators' fundamental premise throughout this litigation has been that they own the only medium for political and other noncommercial advertising. However, in a major concession and a judicial admission, in their Respondents' Brief, the billboard operators admit that five percent of the on-site signs in Moreno Valley bear noncommercial messages. Respondents' Brief, page 14. Although there is no evidence in the record concerning the percentage of billboard advertising that is "noncommercial," it is virtually certain that that number is far lower than five percent. By their admission at page 14 of their brief, the billboard operators have conceded that their entire case is without merit.

Hence, the billboard operators' discussion, at pages 13-14 of their brief, concerning "how the ordinance works" is misleading.

The ordinance recognizes two basic classes of advertising. There are on-site signs, and there are off-premises advertising structures/displays (commonly called, and even called by the respondents, "billboards"). These are regulated differently. Billboards, which have changeable copy and do not advertise goods or services colocated with the billboards, are regulated by Section 19.3; which expressly incorporates those provisions of the State Business and Professions Code which regulate the outdoor advertising (i.e., billboard) business. On-site signs are regulated by Section 19.4. Billboards are allowed to be up to twice as high as on-site signs, and up to four times as large; however, they are restricted to certain industrial and commercial zones, while on-site signs are allowed in many more zones throughout the City.

That is how the ordinance works. The ordinance, in its entirety, constitutes Appendix B to the Petition, and anybody can see how it works.

V
A CITY DOES NOT HAVE TO PROVE THAT ITS ORDINANCES ACTUALLY ENHANCE SAFETY AND ESTHETICS

One of the main contentions of the billboard operators throughout this litigation has been that the City of Moreno Valley bears some burden of proving that its ordinance has actually enhanced public safety and community esthetics. *See* Respondents' Brief, pages 9-10. The Ninth Circuit apparently agreed. Petition, Appendix A, page A-11.

A similar contention was made by another billboard operator in *Ackerley*. 108 F.3d at 1097. In that case the Ninth Circuit disagreed. *Id.* at 1099-1100. The petitioners in this case are reliably informed that a petition for certiorari will be filed in the *Ackerley* case.

The Ninth Circuit in the instant case is wrong, and the Ninth Circuit in *Ackerley* is correct. This Court should grant certiorari in order to provide definitive guidance to a confused and divided Ninth Circuit.

The billboard operators in the instant case have previously contended, and the Court of Appeals apparently agreed, that the City's burden was to show that this particular ordinance was successfully accomplishing the goal of enhancing public safety and esthetics. "[T]he City failed to provide any evidence . . . that the ordinance furthered those interests." Appendix A, page A-11.

The respondents, recognizing the absurdity of requiring a city to prove the efficacy of its ordinances even while those ordinances are being flouted by the respondents themselves, have backed off from their original position and repudiated the position of the Court of Appeals. The burden on the City, they now contend for the first time, is to present evidence that restrictions on billboards "anywhere in the world" promote safety and esthetics. Respondents' Brief, page 9. The burden, the respondents now say, would be met by the introduction of "expert testimony or other evidence" that billboards are ugly and/or cause accidents. *Id.*, page 10.

This Court has already definitively recognized that the regulation of billboards promotes the interests of esthetics and public safety. *Metromedia*, 453 U.S. at 512 (1981). The Ninth Circuit itself has acknowledged this. *Ackerley*, 108 F.3d 1098. The City of Moreno Valley, like any other municipality in the country, is entitled to rely on this proposition as a matter of law. *See Ackerley* at 1097-98.

VI
THIS COURT HAS RECOGNIZED THE REGULATION OF BILLBOARDS TO BE *SUI GENERIS*

In the unrelenting campaign of billboard operators to attack municipal regulations all across the country, the billboard operators try to persuade the courts to overlook this Court's opinion in *Metromedia* and to analyze each separate ordinance not under the criteria of *Metromedia*, but under criteria established in other cases to deal with the regulation of other subjects. *See* Respondents' Brief, pages 15-16; *cf. Ackerley*, 108 F.3d at 1097-98. However, "each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses, and dangers' of

each method." *Metromedia*, 453 U.S. at 501 ("deal[ing] here with the law of billboards").

In *Metromedia*, this Court held that billboards could be regulated, and even prohibited altogether. This Court set forth the reasons why such regulation was consistent with the First Amendment and indicated the limits on such regulation. After *Metromedia*, the question of whether billboards may be regulated is no longer an open one.

Moreover, municipal regulation of billboards is to be analyzed in accordance with the principles enunciated in *Metromedia*, and not by analogy to regulations dealing with other forms of expression or with the advertisement of particular commodities. Although the Ninth Circuit stumbled over the issue in the instant case, it has not always done so: "We hold that *Metromedia* continues to control the regulation of billboards." *Ackerley*, 108 F.3d at 1099.

In a weak effort to distinguish the instant case, the Ninth Circuit in *Ackerley* characterized this as a case in which the "city made no effort to show that it enacted its billboard ordinance to further any interest in esthetics and safety." *Id.* However, that is manifestly not the case. The very section of Ordinance number 133 that comprises the regulation applicable to billboards, and introduces the detailed standards to be employed in such regulation, states that permits for billboards will not be issued absent a finding "that such a display will not have a harmful effect upon the health or welfare of the general public and will not be detrimental to the esthetic quality of the community . . . " Appendix B, page B-4.

Is constitutionality really a question of where the "statement of purpose" is placed? Or of how many words it contains? *Cf. National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 555 (2d Cir. 1990), *cert. den.* 498 U.S. 852 (1990); *but see Dills v. City of*

Marietta, 674 F.2d 1377, 1381 (11th Cir. 1982), *cert. den.* 461 U.S. 905 (1983) (general statements of purpose are often mere rationalizations).

Given that this Court has, and other courts have, held that regulation of billboards necessarily tends to promote public safety and community esthetics, is it really necessary that there be a "statement of purpose," as such, at all? If the regulation of billboards actually promotes safety and esthetics, would that be any less true if the particular members of a given city's governing board enacted such regulations because they were bribed to do so by, say, the skywriting industry lobby?

VII
AN ACCURATE STATEMENT OF THE CASE SHOWS THAT THE INDIVIDUAL EMPLOYEES ARE ENTITLED TO QUALIFIED IMMUNITY

In an attempt to prevent this Court from reviewing the qualified immunity issue with respect to the individual City employees, the billboard operators have misstated the case.

The individual City employees are entitled to qualified immunity unless, under established law, as of 1988, a reasonable official, similarly situated, would necessarily have known that the employees' alleged acts violated the clearly established rights of the billboard operators.

The billboard operators attempt to introduce confusion about what those alleged acts were. Basically, they fall into two categories, steps taken to enforce the ordinance and torts under State law. The first group of allegations referred to by the billboard operators in their brief are merely increasingly hyperbolic ways of stating that the employees attempted to enforce the ordinance

(sending of violation notices, threats of prosecution, attempts to promulgate and enforce an ordinance, "harassment").

One of the billboard operators (Outdoor Media Group, Inc.) attempted to introduce the second group of allegations into the final pretrial order for the sole purpose of preventing judgment on the pleadings. The allegations are of State law torts (interference with contract, defamation). The allegations were not contained in the complaint, and, if they had been contained in the complaint, they would have been dismissed in July 1989, when the district court abstained and expressly retained jurisdiction over the federal constitutional issues only. The City and the other defendants in the district court objected to the unilateral attempt to introduce these allegations into the final pretrial order, and the district court obviously treated them as nullities.

Even the Ninth Circuit dealt only with the allegations of attempts to enforce the ordinance. The Court of Appeals reversed the grant of qualified immunity because "the City officials, in attempting to enforce the ordinance, violated clearly established constitutional rights of which a reasonable person would have known," although the United States District Judge evidently did not.

In the clear light of an honest statement of the issue, it becomes clear that the City employees are entitled to qualified immunity, and this Court should grant certiorari for the purpose of reversing the judgment of the Ninth Circuit on that issue.

VIII
CONCLUSION

For the reasons set forth in the Petition, and because the opinion of the Ninth Circuit in this case conflicts with the opinions of other circuits and of the Ninth Circuit in other cases, and, not least, because the billboard operators themselves agree that this case presents issues for review by this Court, the City of Moreno Valley, et al., respectfully submit that a writ of certiorari should issue from this Court to the United States Court of Appeals for the Ninth Circuit.

DENNIS J. MAHONEY
Counsel of Record
LEWIS, D'AMATO, BRISBOIS & BISGAARD LLP
Attorneys for the Petitioner
650 East Hospitality Lane, Sixth Floor
San Bernardino, California 92408-3508
(909) 387-1130